UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 10-11727-REG
PALI HOLDINGS, INC.,	.	
Debtor.	.	
BRADLEY REIFLER and DAVID WASITOWSKI,	.	Adv. No. 11-01682-REG
Plaintiffs,	.	
v.	.	
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,	.	
Defendants.	.	
PALI HOLDINGS, INC.,	.	Adv. No. 10-03533-REG
Plaintiff,	.	
v.	.	One Bowling Green
	.	New York City, NY 10004
LLOYDS OF LONDON,	.	
Defendants.	.	September 20, 2012
	.	12:25 p.m.

TRANSCRIPT OF DISCOVERY DISPUTE AND STATUS CONFERENCE
BEFORE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY COURT JUDGE

Audio Operator: Jeanelle

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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For the Chapter 7 Trustee of Pali Capital and Pali Holdings, Inc.:	Fox Rothschild LLP By: ERIN ZAVALKOFF-BABEJ, ESQ. 100 Park Avenue, Suite 1500 New York, NY 10017

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THE COURT: All right. Going on to Pali Holdings. Let me get appearances and then I'd like everybody to sit down.

MR. SMITH: Good morning, Your Honor. This is Gregory Smith for plaintiffs Bradley Reifler and David Wasitowski. I'm joined by my colleague Douglas Schneider to my left.

THE COURT: All right. That's Mr. Smith and your colleague's name is Ms. Schneider -- or your name is Schneider.

MR. SMITH: Mr. Schneider, yeah.

MR. SCHNEIDER: S-c-h-n-e-i-d-e-r.

THE COURT: All right. Thank you, Mr. Schneider.

MR. SCHNEIDER: Thank you, Your Honor.

MS. ZAVALKOFF-BABEJ: Good morning, your Honor. Erin Zavalkoff-Babej representing the Chapter 7 Trustee of Pali Capital and Pali Holdings.

THE COURT: Forgive me, your last name again?

MS. ZAVALKOFF-BABEJ: Zavalkoff.

THE COURT: Zavalkoff. Okay. Okay.

MR. WALSH: Philip Walsh for the defendants and my colleague and partner John Coulter.

THE COURT: All right. Mr. Walsh, you used the words defendants, I assume you're the Lloyd's Underwriters?

MR. WALSH: Yes.

THE COURT: Okay. All right. Folks, I have reviewed the various letters, and it appeared principally from Mr.

Walsh's letter which was in the middle of the sandwich that some of the issues are moot, maybe many of them are moot. My view, again my tentative California style, is that requiring somebody to put up a 30(b)(6) witness when the witness wouldn't know anything is stupid and is a waste of everybody's time and I would be disinclined to order that. It looked like the documents in the privileged list have either been wholly or substantially now provided.

So, Mr. Smith, I know you were looking for relief. I need you to tell me what's still on the table and then I'll hear first from you and then Mr. Walsh and let's see what's still up in controversy.

MR. SMITH: Well, I'm very confused by what Your Honor has concluded from the correspondence. I know of nothing that's mooted. I know that Mr. Walsh has made the contention that there's nobody at the managing agent for the lead underwriting syndicate who has direct personal knowledge.

THE COURT: Then nobody at the syndicate can testify to claim any facts that you may want to prove and they may have a harder time refuting you, but how could you make knowledge come out of the air?

MR. SMITH: They have a claims file which has significant documents in it. They --

THE COURT: I thought their claims file was produced.

MR. SMITH: It was not produced. I do not have a

claims file. I've never been produced a claims file. What I've been produced is correspondence between Pali Holdings or representatives of Pali Holdings and Illinois counsel, coverage counsel, who did the claims investigation, but what I don't have is, for instance, any documents between coverage counsel in Illinois and the Underwriters in London, not giving legal advice, but documenting the investigation, the facts that were learned, the requests that were made to the insureds that allegedly were not fulfilled.

I mean one of the things that Underwriters has done here is that they've thrown a bunch of non-coverage affirmative defenses on the wall to see what will stick, one of them is a breach of the cooperation clause and there are several subparts related to that defense, one that the person seeking coverage here, as well as Pali, deprived the Underwriters of the ability to mount a defense because they retained their own counsel. They did so of course. What they don't say is that they retained this counsel with the blessing and consent of the coverage counsel in Illinois.

But one of the other things they state as a breach of the cooperation clause is that Pali did not provide information that was requested. The -- if they're going to make that defense I'm entitled to depose somebody who can give me the facts underlying that defense. And so --

THE COURT: Now, Roberts is available as a third

party witness or would at least seemingly be available as such, right? James Roberts?

MR. SMITH: He's no longer employed, but --

THE COURT: Big deal. Why does that matter?

MR. SMITH: It doesn't matter to me. That's -- 30(b)(6) says you can designate anybody, you can hire a third party. So that's why --

THE COURT: Well -- look, all of us have been litigators at one time or another. I was a litigator for 30 years before I started this job. In most cases 30(b)(6) is a quick, clean procedure because there's somebody still at the opponent who knows something about what's going on.

MR. SMITH: Your --

THE COURT: But there are cases when the 30(b)(6) witness would either have to educate himself or herself or even that would be useless. Now, I've never been a fan of the 30(b)(6) witness educating himself or herself, but if parties are happy with that that's fine, but the best evidence is by the people who know what happened, and if there is nobody on behalf of the syndicate who has first-hand knowledge, well Mr. Walsh may have deal with that down the road, but he can't make a witness with knowledge materialize out of thin air.

MR. SMITH: Well, I submit, Your Honor, that that's exactly what's going to happen here. That Mr. Walsh will put somebody up, either it will be coverage counsel from Illinois

or it will be someone he educates at Brit because he does have the materials to educate a witness, he just hasn't done it and that person --

THE COURT: Wouldn't that at least seemingly be whatever that witness said be hearsay?

MR. SMITH: Potentially. Potentially, but not if it's not if Mr. Hanson (phonetic), the coverage counsel from Illinois, who refused to sit for his deposition. I expect that there will be an affidavit presented from Mr. -- signed by Mr. Hanson which will attempt to introduce all the facts underlying their defense based on lack of cooperation, based on breach of the warranty clause. There's a contention that the CEO of Pali when he signed the application for insurance knew a whole bunch of things that weren't disclosed.

They -- Your Honor, 30(b)(6), now I maybe naive about this, but the case law says if you don't have somebody with personal knowledge at the organization it's not optional. You have to educate someone and if you have the documents to do it, if you have -- if outside counsel has knowledge then that's where you get it from. You have to -- the witness, whoever you designate, has to sit down, review binders, review the relevant documents. If there's anybody in the institution that does have personal knowledge about this or that aspect you interview them and you learn what -- but --

THE COURT: And do any of those cases say that the

Court should order that even when it would be a useless exercise?

MR. SMITH: I -- but how have we established that that would be --

THE COURT: The underlying documents producibility that would be reviewed by such a 30(b)(6) witness is a very separate issue. That goes to relevance. It goes to attorney/client privilege to the extent there is any such, and it goes to work product and attorney mental impressions to the extent those are discoverable or discoverable under extraordinary circumstances, but --

MR. SMITH: Well --

THE COURT: -- you're telling me that I have to direct your opponent to educate a witness when the witness knows nothing and to order it. If you have a case that tells me that, I would like to read it because I've been doing this for 42 years and I've never seen it.

MR. SMITH: Mr. Schneider will address that.

MR. SCHNEIDER: Your Honor, if I might the -- Brit Insurance has asserted defenses in the case. If they have nobody to assert those defenses then the defenses should be struck. If you assert defenses that require a factual basis then if you don't -- who is that filed the answer in this --

THE COURT: Forgive me, Mr. Schneider, the rule of law is not what you stated, is that affirmative defenses must

be proven. They must be proven by one means or another.

MR. SCHNEIDER: But you need a good faith basis to assert them, Your Honor.

THE COURT: Forgive me, you don't argue with me.

MR. SCHNEIDER: I apologize.

THE COURT: Yes, and if the good faith basis is not apparent from other evidence in the case we can deal with that at an appropriate time, but there are an array of mechanisms by which facts may be proven. They may be proven by documents. They may be proven by third party witnesses. They may be proven by taking an opponent on adverse direct. I have ruled on this issue or if I haven't made it clear that I've ruled on this issue I'm making it clear now. Let's move onto the areas where you guys have stronger points.

MR. SMITH: Well, Your Honor asked for case citations related to 30(b)(6) deponent's obligation to educate a witness who had no prior knowledge. I can give you two right now, QBE Insurance Corp. v. Jorda Enterprises which is cited in all the treatises as one of the most succinct and authoritative descriptions of a 30(b)(6) deponent's obligations to designate a witness and educate that witness in order to testify on behalf of the organization. I mean the purpose of the rule was to prevent bandying so that defense counsel --

THE COURT: To prevent what?

MR. SMITH: What is called bandying, where you bandy

the plaintiff's attorney or the attorney trying to take a deposition from one person to another who disclaims personal knowledge about this or that fact in dispute and then you have to notice somebody else's deposition and guess -- try to guess who within the organization would have personal knowledge of that. 30(b)(6) is an attempt to stop that practice and --

THE COURT: Well, I understand that, but if the lawyer on the other side steps up to the plate and says I don't have anybody I don't see how anybody is being bandied, is that the word?

MR. SMITH: Bandied, to bandy someone from one person to another. It's called bandying. That's what it's referred to in the treatises and the case. That citation is 277 F.R.D. 676. It's a Southern District of Florida case. There's another Great American Insurance Company of New York v. Vegas Construction Company 251 F.R.D. 534. Your Honor, if you were to open Wright and Miller or Moore's Federal Practice on 30(b)(6) it would tell you exactly the same thing.

Yes, they do have an obligation to -- if they have the ability -- I'm not asking them to designate a witness to testify about the Mars Rover. What I'm asking them to do is to designate a witness who is going to be able to tell me what they contend the facts are that underlie their affirmative defenses. And they, as Mr. Schneider said, presumably at one point they knew these facts because they had to have a good

faith basis to plead these affirmative defenses, and they have slightly answered interrogatories by referring to certain documents where we can go looking for these facts, they say.

So they do have through the documents in their possession, through interviewing their coverage counsel in Illinois, et cetera, et cetera, they do have the ability to marshal these facts, designate one or more witnesses, educate those people and let me figure out what the organizational contentions are.

Mr. Walsh made the very generous offer that I could use Hague Convention procedures to go chasing people who used to work there who he didn't know where they were and so -- but that's exactly the sort of thing that 30(b)(6) is designed to protect against. It's not -- I really don't care who testifies. I'm not concerned about the person who has personal knowledge. What I'm concerned about is what does -- what are the organization's contentions in this litigation related to the facts underlying their affirmative defenses, the contentions they make about the most basic interpretations of the policy here. I couldn't get them to answer those questions.

They -- neither one of their witnesses for the lead underwriter or the following underwriter would tell me what they consider the claim as defined in the policy to be here. How can I prepare a defense when in the first instance the guy

says I have no idea because I've never reviewed any document related to this case and the second guys wouldn't -- Mr. Walsh wouldn't allow him to answer because he said that's attorney/client privilege? How can I prepare a defense when I don't even know what they think the claim in -- for coverage under this policy is?

And the policy defines a claim either as a lawsuit or a written demand for damages, a written demand for relief made against an insured. So it does not have to be a lawsuit, and we have -- in the history of this litigation we have written demands for relief made against my clients. So -- and I can't get the Underwriters to take a position as to what they consider the claim under their own policy to be. So I don't see how I can prepare a defense for trial when I have to guess as to what their position is going to be.

Now, I do have a recommendation for getting this all off the table and let's go trial. If they want to withdraw -- they've basically admitted, at least for strategic purposes for today's conference, that they have no way of coming up with this knowledge to educate a witness to sit for a 30(b)(6) deposition. Okay. Well, then withdraw the defense, don't put any evidence in support of those affirmative defenses and let's just argue about coverage which is what we should have been doing from the very beginning.

Let's -- what this case I believe will come down to

is does the insured versus insured exclusion eliminate coverage for my client's claims, and does the allocation clause at least bring back coverage to the extent that some of the claimants were not insured under the policy, so that some of claims were asserted by non-insureds against insureds? Admittedly there were claims asserted by insureds against insureds.

What I think the case will come down to and what Your Honor will be asked to decide is a pure question of law. How do you interpret the insured versus insured exclusion and does the allocation clause -- if the exclusion applies does the allocation clause give back some proportion of coverage? I think that's at the end of the day what this case will revolve around.

So if they don't have any way to educate a witness to sit for a 30(b)(6) deposition to testify about facts related to their claim that there was a breach of the warranty clause, to testify about the facts to underlie their defense that there was a breach of the cooperation clause then withdraw those defenses and let's get to coverage, and I don't need to depose anybody at that point, but the only reason I'm asking to depose the entity, the managing agent which was in charge of the claims handling, is if anybody knows they do. They hired counsel in Illinois to conduct a claims investigation. They won't let him sit for a deposition. They won't produce any of his documents related to -- let him produce any of his

documents related to the claims investigation. I have no way of preparing for those defenses. They're --

THE COURT: You're getting very, very repetitious, Mr. Smith.

MR. SMITH: I understand.

THE COURT: Move onto your next point.

MR. SMITH: The -- well, I mean the other points are minor in comparison. I mean -- and they turn somewhat on whether Your Honor is going to take a position or not about whether they can actually put up witnesses at this point to testify in favor of these -- in support of these affirmative defenses. If they can what I would like to do is, either today or get permission from Your Honor to make a motion, to demonstrate that the legal authority is extremely clear.

When an insurance company hires counsel to conduct a claims investigation, two things flow from that. Any documents that that counsel generates prior to the insurance company making a determination that there is no coverage and communicating that no coverage declamation to the insured cannot be claimed as work product because before the insured denies coverage there is no dispute that could reasonably lead to litigation. That's true both in New York and it's true both in Illinois where Underwriter's coverage counsel is based.

The other very clear proposition from the authorities, both in New York and Illinois, is that any

documents, any correspondence between the coverage counsel who's doing the claims investigation and the insurance company, is not protected by the attorney/client privilege unless the coverage counsel is providing legal advice to the insurance company about what it should do, what position it should take, but communications that -- from counsel to the insurance company that are reporting the facts that the counsel has learned, the steps that the counsel has taken to figure out -- to request information from the insured, to document information received from the insured, all of that is not covered by the attorney/client privilege because the lawyer is acting in the same capacity as an in-house claims adjustor would be acting for an insurance company and you can discover those communications in-house when they're performed by an employee of the insurance company. And the Courts have taken the position that you don't exempt yourself from that sort of discovery simply by virtue of hiring a lawyer to handle claims investigation.

And there are tons of documents on the newly revised privilege log that we received on -- late on September 18th that now list documents that were listed originally on the privilege logs produced by Illinois counsel. And so what I would like to do is figure out someway -- if again we're going to be litigating issues concerning what happened during the claims investigation process what I would like to do is figure

out someway to get a ruling from the Court and even if involves an in camera inspection of documents listed on the privilege log whether there are documents there that simply document counsel's claims investigation and either don't relate to or can be redacted to remove legal advice that may also be contained in those communications.

And there are about a dozen documents, even more, that have been withheld on the basis of the work product doctrine which were generated prior to November 25th, 2008, which is the date that the insurance company communicated no coverage to Pali. So the -- there's a bright line in the cases that says no work product protection at all, not even arguable, for documents generated prior to communication of the insurer's decision to deny coverage, and they're still withholding them, both counsel in Illinois and Mr. Walsh, and refused to produce them. I -- you know, I've provided case authority on that. I've never received any argument back that suggests that authority is not applicable, that I'm misinterpreting it, no citation of contrary authority. It's just been ignored.

So, you know, I -- again, I think what will happen is that Your Honor will be presented with an affidavit signed by Mr. Hanson, coverage counsel in Illinois, and if that's going to happen I think the rules entitle me to not only depose him, but to get a document production from him that is consistent with the obligations, discovery and disclosure obligations, as

interpreted under the Federal Rules of Civil Procedure. The -- Doug, do we have any other issues?

MR. SCHNEIDER: (No audible response).

MR. SMITH: Mr. Walsh served responses to our request for admit -- the request to admit were served on May 22nd. I pointed out their failure to respond within 30 days in my letter of September 13th. Those responses were first -- first reached me in late September 18th attached to Mr. Walsh's letter. They offer no explanation for why they didn't respond within 30 days. I think it's pretty much automatic that the request for admissions should be deemed admitted in their entirety. Anything else, Doug?

MR. SCHNEIDER: (No audible response).

THE COURT: All right. Mr. Walsh?

MR. WALSH: There's no motion made in terms of the request for admission, but they were -- we responded to them and we admitted 80 percent of them.

THE COURT: Why didn't you respond on time?

MR. WALSH: Well, because we didn't, Your Honor, and we apologize for that and I'll tell you this case -- first of all, I want to say, you used the word fragging twice. That does take me back 40 years, and so I'm going to ask that -- and I wrote this down when you said that, we get a direction from the Court that counsel cease and desist from writing vituperative incandescent letters to the Court. So with --

THE COURT: Well, frankly, Mr. Walsh, both sides are getting me a little, I won't use the original word I was going to use, annoyed. Deadlines exist for a purpose. If you can't meet your deadline you call up your opponent and you ask for extra time. I've never been a fan for request for admission, but you can't just ignore them.

MR. WALSH: No, no, I understand that, Your Honor, and I tell you we apologize for that and he's got them, and if there's anything I can do to make it better -- I mean I didn't resist it. When I did respond to them they responded in the fashion that they ought to be, namely, I admitted -- I think there's 15, I admitted 13. So I mean, you know, if they're deemed admitted they're admitted, but, you know, I'm not hiding anything.

And in terms of -- the other thing I want to add before I make a brief commentary because I don't think I need a lot is the trustee's counsel which has far more financial stake in the result of this case has not once joined in the activities of the counsel for Reifler and Wasitowski who are chasing their legal fees. There's far more financially at stake by the trustee. She has not -- they have not -- Fox Rothschild has not joined in at all and that speaks volumes as far as I'm concerned.

Now, in terms of the case itself I've been litigating for 35 years over that, insurance coverage. This case involves

the underlying pleadings, the litigation, the motions, the depositions that were taken in the underlying. It's not like a fact investigation where you go out and you have some kind of a fidelity bond claim where you look at the facts and circumstances. It's all there in the pleadings, it's there, and you apply the policy wording to those underlying issues. Then you also look at the cooperation and the other issues, but that's developed. Once it's there it's there and you apply the applicable law.

Now, from a practical standpoint the internal e-mails between James Roberts who was the lead on this from day one and who left -- and I told in my answers to the interrogatories, my responses, I said he's no longer there. He was involved, and the question in the interrogatories was very specific. They want to know the names of those individuals who materially participated in the making of the decision to deny coverage. That was a specific request in the interrogatories. I responded. I said, James Roberts, Jamie Fleming, Keith Hanson in Chicago and Tordie (phonetic), the latter two are lawyers.

I also said in my answers to the interrogatories that Roberts was no longer there. He hasn't been in Brit in a year. I revised my -- in the interim between my revision of the answers to the interrogatories and the initial service of the answers to the interrogatories, I had a telephone call with counsel and I did say over the phone where James Roberts was

and I said it was Barbican Insurance Company in London, and then I said several times, look at, use the Hague Convention, you know, he's there. He's not going anywhere.

THE COURT: You don't need the Hague Convention for taking a deposition in the U.K., do you?

MR. WALSH: I think -- I'm not sure, Judge, because I never did it. I mean I never did a third party witness, but he was there. He could have -- I mean counsel could have looked into it. All of the documents, all of the e-mails which I've identified, and I'll get to that, all have James Roberts' name on them.

I then followed up in my responses, my revisions, saying Debra Allan was now handling this claim. She was a senior claims examiner, the same as Roberts before he left. I also said in my answers to interrogatories that the only thing she knows about this file is from the lawyers. So most or if not -- most I think I said, most of her testimony will be privileged. Nothing happened.

There was -- you know, and then we decided on depositions. Deposition of Fleming was going to be on the 16th, Allan was on the 15th, Wednesday. On that Wednesday before they called me from Brit and said she'd left the company and there was no one there except for David Gillis who was her -- sitting next to her I suppose, I mean not physically, but in terms of seniority and that he was on vacation, but he would

step up. I immediately advised counsel that there was a change and David Gillis would be the witness.

I met David Gillis on Tuesday before the deposition for a couple hours and I met him on Wednesday morning because the deposition started at one. All he -- the only information he got, whether he's a 30(b)(6) or otherwise -- first of all, he wasn't -- he had no material participation in the making of the decision to deny coverage and, secondly, he learned it from me.

Now, it's all I can -- and I told -- and you'll see on my letter I said during the deposition or when it started that, look at, there's no way on earth that we can produce anybody that knows the facts in this case and I mean, you know, I told --

THE COURT: How are you going to prove your affirmative defenses --

MR. WALSH: I'll show you how.

THE COURT: -- Mr. Walsh?

MR. WALSH: It's simple. We prove it from the conduct of the plaintiffs. That's how we do it. There are letters from the insurance lawyers to -- which I've produced obviously, to the -- both the trustee's lawyers --

THE COURT: Insurance lawyers for whom?

MR. WALSH: For the Underwriters, the coverage lawyers, where they denied the claim. There was -- there's --

there must be three inches, two inches, three inches of documents, correspondence going back and forth from the lawyers to the representatives and lawyers of Pali and Reifler and Wasitowski. They're there. They were taking a position -- they were telling them, that is to say the plaintiffs, in 2008 the deficiencies. They were telling them that. And how did they know it? From what they -- from the documents. There's no -- what he said, you're hiding the ball, there's no hidden ball here.

As a matter of fact the -- all of the -- and to be as candid as I can with the Court, all of the 11 letters that went from the Hanson firm and then one from Tordie and the litigation was ongoing, all involve legal recommendations based upon the law because they had the underlying litigation. They had I assume access to the depositions given. They had the motions. They had the affidavit of Helen Mogul (phonetic) on the one hand and Thomas Morland (phonetic) on another where they were talking about this internecine warfare. And, indeed, what I did is in my answers to the interrogatories when they asked me on what basis do you deny the claim or on what -- I recited everything. Nothing is going to change, it's that.

And I'm quite happy if the Court wants to, is to give these documents to any third party and say you give Mr. Smith those portions of the 11 reports which you reckon and deem not to be privileged. I mean the whole thing is privileged. It's

legal issues with recommendations.

THE COURT: There's a distinction, as Mr. Smith pointed out and in this respect I was inclined to agree with him, between providing legal advice based upon your legal analysis and a lawyer going out as an investigator and gathering up facts from the outside world and relaying them to its colleague.

MR. WALSH: That's why I wanted to distinguish that as you've just articulated it to what we've got here. This is not a situation where you've got a fidelity bond claim with a bank where the lawyer goes out and investigates all of the various intricacies that caused the defalcation and then writes an opinion to the client. These -- the opinions that were -- the opinions that these lawyers wrote, I've read them, all have to do with the underlying litigation and the documents. As a matter of fact all of the documents produced to me both by -- literally 99 percent by both the trustee and Mr. Smith are the underlying pleadings and that's what we have. That's what I've produced.

Now, he wanted me to go back further. When we came back from the depositions we came back on -- they were done on the 17th, I came back to New York. On Monday I got an e-mail from Mr. Smith saying he demanded a privilege log, and I wrote back, I said, well, you never gave us one. So, you know, we bandied this back and forth for about -- and then -- oh, and

then we Reifler and Wasitowski's depositions. So on Friday night, the 24th, I get five pages -- five documents identified as a privilege log. Well, then I did my homework. I wrote and identified, and with specificity, the length the document, the date and the subject matter of each one of the 11 reports sent to the Underwriters. That wasn't good enough. He wanted more. He said, you know, you're -- Jamie Fleming said that there were e-mails going back and forth, I want all those.

So this past week I've gone over all of the documents that I have at all, and there are covering e-mails from Joanne Fercano (phonetic), who is an associate attorney at Hanson's firm, attaching their reports, back and forth communications, so and so is on holiday, sorry, but he -- you know, he agrees. I identified all that for the sake of good order.

And when the Court hears that we didn't produce the claims file, of course we did. I produced everything that was given to me that the lawyers had in Chicago. I didn't produce their work product. I didn't produce their legal analysis. I didn't produce their recommendations.

THE COURT: There are three separate things here, Mr. Walsh, and we can't blend them together. The first is the legal advice that a client -- that a lawyer provides to his client or in certain instances what a client provides to the lawyer for the purpose of providing legal advice.

MR. WALSH: Right.

THE COURT: But here you have the attorney's side doing the investigation. Then there are attorney mental impressions which are normally privileged under all circumstances, technically not privileged, but protected. Third, there is work product which are facts that the attorney or an agent of an attorney gathers up which can be produced under an appropriate showing of need.

MR. WALSH: Right.

THE COURT: And with -- especially with Roberts being difficult to reach you're exposed especially on the third. Now, isn't your opponent entitled to get production of your work product or at least scrutiny by a judge after the determining that there is no suitable alternative way for your opponent to get that stuff?

MR. WALSH: First of all, I have no problem with producing any of this to the Court and let them make up their own mind. That's -- I'm happy with that. These letters are not fact investigations. They're a recitation of the underlying pleadings which is what I got which is what the trustee gave me which is what my clients had and which is what the lawyers had. I mean I did a little bit more. I've gone through discovery in this case. They didn't do that, but I've done it. I have no problem -- I'm not hiding a thing. If the Court wants to see all 11 reports with recommendations and all of the communications I just think it's a waste of time.

Now, in terms of the documents that they relied upon, it was the pleadings. And he was absolutely right, you know, this is going to probably come down to -- it's nuance, but it's insured versus insured and it's --

THE COURT: But you're making an additional claim. Forgive me, Mr. Walsh, but you're making an additional claim that your guys were defrauded into providing coverage or continuing coverage.

MR. WALSH: That --

THE COURT: And putting aside the means by which that information should be conveyed --

MR. WALSH: Right.

THE COURT: -- would you agree that you've got to let Mr. Smith know the ways by which you're contending that your client was sucked in?

MR. WALSH: Yeah, I will, and I'll tell you right now, very simple. Reifler testified that he had problems with Cohen going back to 2001 when they had EURAM. They were both investors. Reifler threw in $300,000 for two percent interest. Cohen was a big investor in EURAM. It was a Viennese bank that they brought as an investment vehicle. According to Cohen -- according to Reifler, Cohen and he were also partners in this company called Pali Capital which was a broker dealer. Reifler put in a million. Cohen put in good will. In 2007 there was going to be what they called a reorg which is a transfer of all

the EURAM shares to Pali Holdings, and my point is this that when Reifler testified, he said he had problems going back to 2005 as to where some of these shares and Capital Holdings popped up from. And that's the reason he was calling Cohen a crook and a money launderer, and he said, I had concerns about this. I was asking Freedman (phonetic), our lawyer, and he never gave me real answers.

Now, then there was the question of the Fifth Amendment that Reifler took in the December 18th deposition in 2008. There was a proxy agreement which he on two separate occasions during his testimony represented that he was given and the voting rights for those shares represented in a proxy statement were sent to him by a fellow named John Staddon who was a shareholder in EURAM and subsequently in Capital Holdings. And he was very vociferous in his deposition, very, very colorful as he was with me, that he had this and he voted it.

So then -- that's September, October. December 18th, 2008, he's examined. He repeatedly take the Fifth Amendment as to whether or not he forged Staddon's signature. That proxy agreement and those negotiations about that proxy took place in March and April -- March of 2007. The application for insurance was signed on June 21, 2007.

Staddon testified in the same underlying litigation and unequivocally said, I never gave him my voting rights. He

never agreed to forgive a debt that I had. So it seems to me that everyone's interested, you know, in this and if someone says I took the Fifth Amendment and a document -- about a document in 2007 and I'm filing an application for insurance and I know of no facts or circumstances which would even bring a claim.

The second thing is he also testified at his deposition that he had concerns about Cohen and others, and there was considerable interest in outside investment bankers and banks to buy, this is just about the time of the reorg, Capital -- Pali Capital. He then at some point commissioned Kroll (phonetic) & Associates to do an investigation. Now, the time line is not clear because we haven't seen the Kroll report or the correspondence leading up to it, but my suggestion is that those are information material to any underwriter.

Now, I'm going to get to the $60,000 question. Mr. Smith only sought witnesses who had material -- materially participated in the making of the decision to deny the claim. I've been involved over 30 years in coverage litigation and usually I represent brokers, they never examine the claims people because it's after the fact. These people aren't lawyers over there. Their internal notes between the two of them are meaningless. They hire lawyers, they do the investigation, and on these very sophisticated legal issues they have to. That's what Jamie Fleming said at his

deposition, I'd ask -- I'd go to the lawyer.

Well, he also was asked a question about, well, what if you had a question about the underwriting, the wording? I'd go to the underwriter. In my 30 years -- 35 years of doing insurance work, I represent brokers mostly, they never -- the claims people are throw-ins. What they want is the broker's file. These wordings are negotiated. They call them bespoke. A lot of them are negotiated, but the broker has the file on it and then they depose the underwriter because this is not a legal issue. This is long before there's any legal issues involved. There's no litigation in sight. They're the ones that do the wordings and they are -- I -- my experience is that they're entitled to ask, not legal questions as such, aggressive legal -- but they're entitled to ask what the intent of the wordings is. So I think he missed the ball here. I didn't hide the ball, but I think he missed the ball.

So -- and I also got the distinct impression this race out to Chicago to put these two lawyers through the tortures of the dam threatening sanctions against them. He subpoenaed Lloyd's America over on Fifth Avenue. They're a service company. That shook up Lloyds. He then deposed Lloyd's itself. I mean, you know, so --

THE COURT: You mean the Society of Lloyd's?

MR. WALSH: Yes, and they had -- they put witnesses up there for them. So it just seemed to me that time was

running away. You know, you manage your litigation. The discovery deadline had been adjourned per your order to the 27th of August. Time was running out, and I think that the -- with the greatest of respect I think he may have seen this slipping by and that's when he wrote on Wasitowski's deposition -- and poor Ms. Blume (phonetic) had to call and, you know, you were on vacation and, you know, he wanted the discovery continued and that's, I think -- I mean that was my visceral reaction from being a litigator for a lot of years that, hey, you know, he wants more time.

But I just think that, you know, to put these people, to put the Society of Lloyd's, I mean they know nothing about this, he wanted to know whether they have policy wording. I mean it just went on and on. It was terrible. I didn't -- I wasn't involved it, but, you know, it shook them up because they have a reputation here.

THE COURT: All right. Mr. Walsh --

MR. WALSH: Okay.

THE COURT: -- you've been a lot of stuff --

MR. WALSH: Okay.

THE COURT: -- most of which is on the merits. You've made a number of factual assertions vis-a-vis the things that you would say by reason to support your contention that the Lloyd syndicate was defrauded into continuing coverage. Have you given Mr. Smith all of the documents that provide the

predicate for what you said to me for the last 10 minutes or not?

MR. WALSH: Yes. Also by the way --

THE COURT: And to the extent that the investigating lawyer --

MR. WALSH: Hanson.

THE COURT: I'm sorry?

MR. WALSH: Hanson.

THE COURT: Hanson, right, described any of the facts that he looked at in his investigation in contrast to his legal views, have you produced that portion of those documents?

MR. WALSH: I tell you I produced -- no, not the reports themselves. I mean -- he's got all the files that we had and what Hanson had and what Tordie had, you know, but I didn't produce -- they're kind of intertwined.

THE COURT: I know they're intertwined and although I hate doing it, I do it when I have to which is I need to review the documents --

MR. WALSH: I'd be happy to give them to you.

THE COURT: -- and -- in camera and address the portions that are protected by privilege and those that aren't. Coincidentally I had to do it in a very case that starts in 15 minutes.

MR. WALSH: No, we're happy to do it.

THE COURT: All right. So we'll work out a time for

that.

MR. WALSH: Can I say one more thing before we close? The witness that we proposed bringing on will be an underwriter because the underwriter is the one that's interested in the information, not the claims people, and that's it. I mean I'm not going to -- I don't intend to bring Fleming. I don't intend to bring Roberts. I don't intend to bring Hanson or have an affidavit by Hanson. I don't need any of them. You know, if an underwriter says -- and I can bring in any underwriter who writes financial institutions and say would you deem this to be material underwriting information that should be disclosed to you? And if he says, yes, that's it. You know, I don't even have to -- I just show him the testimony in the record, nothing else, no hidden facts.

THE COURT: All right.

MR. WALSH: Now, one more thing, Your Honor, before I finally close. I mentioned -- and maybe this will help solve things, I mentioned earlier today in a meeting with the trustee's counsel about the possibility of a mediation and I thought that maybe -- because it seems to me that this is vituperative going back and forth with the discovery is maybe never ending and I thought a mediation with the trustee's counsel there with the mediator, along with Mr. Smith, may result in a settlement and may result in a resolution hopefully, but certainly that would be --

THE COURT: By a settlement you mean of the underlying controversy?

MR. WALSH: Yeah, it would -- yeah. So I mean she's said she would go back to the trustee and take that recommendation with her. I mean I threw it up as a vehicle to resolve this.

THE COURT: All right. All right. Here's what we're going to do, folks. First of all on the idea of a mediation I welcome it. This case has been way to confrontational for way too long and so you're going to work to try to make that happen or explain to me why it can't.

MR. WALSH: Yeah.

THE COURT: On the underlying issues this is what we're going to do, as a general proposition I agree with Mr. Smith that if a person, even if a lawyer, does investigating the merits of a claim, the legal advice he provides by reason of his investigation is privileged. His attorney mental impressions are effectively privileged. We don't use the privilege word, but are fully protected, both the facts that he discovers as part of it's investigation or that he considers significant or not privileged. They're merely a work product, and upon a showing of need which we now have here because Roberts is difficult to examine, they're going to be produced.

So you're going to give me, Mr. Walsh, the reports and I will authorize you to redact the portions that are in the

first two categories and tell you what portions are in the third category that need to be shared with your opponent.

I am sustaining the objection that you raised, Mr. Walsh, to the need to educate people who don't know anything about the case to then be deposed as 30(b)(6) witnesses. I don't slice and dice the extent of knowledge that a prospective 30(b)(6) witness has to have, if he or she has any, but if the witness would -- is wholly ignorant of the matter I reject the notion that you then have to educate a witness so that he or she can testify about something that the witness otherwise doesn't have anything -- know anything about. You may have to face the consequences of not having a witness who can't prove your allegations, but that isn't the same thing.

Nobody gets to testify before me unless he or she gets deposed. So -- and you're going to think long and hard how you're going to prove the facts upon which you're going to raise your affirmative defenses, but if you're going to do with a human being, that human being is going to be deposed. And for the avoidance of doubt I don't think you quarreled with the notion that if your opponent wants to examine Roberts your opponent has that right and he does, and that's whether or not Roberts testifies.

Now, work it out with Mr. Smith the timing under which you're going to get me the documents and I'll review them and get to rule on them as soon as my circumstances permit. I

have many, many things on my plate. In the meantime deadlines for completing discovery are tolled. Okay.

MR. WALSH: Your Honor, just -- you want the entire document and then you'll --

THE COURT: Whatever you haven't already given to Mr. Smith --

MR. WALSH: I'll send you the entirety.

THE COURT: -- that Mr. Smith asked for.

MR. WALSH: There's 11.

THE COURT: All right.

MR. WALSH: Thank you.

MR. SMITH: Your Honor, may I do some cleanup?

THE COURT: If it's merely cleanup and not rearguing --

MR. SMITH: It is. I'm --

THE COURT: -- matters I've already addressed.

MR. SMITH: I'm not going to address any of the merits. As it stands right now we're supposed to have pretrial briefs to Your Honor on October 18th, whether we -- with a trial --

THE COURT: If any of --

MR. SMITH: -- on or after November 1st.

THE COURT: -- this stuff is relevant to what you'd putting in your pretrial brief that's going to have to be tolled.

MR. SMITH: Is it tolled as of now or do we wait until Your Honor does an in camera review or --

THE COURT: Well, your duty to keep working on them stops for the time being and you duty to submit them stops and it'll be recalibrated based on when you have the rulings from me and when you get production of anything that I conclude should have been produced earlier, but hasn't been.

MR. SMITH: Okay. When you say discovery deadlines are tolled I assume at this point no one is to be noticing any depositions either or --

THE COURT: No, discovery cutoffs are tolled.

MR. SMITH: Right, that's what I meant.

THE COURT: No, you guys can keep deposing. You can keep working on discovery as is otherwise appropriate.

MR. SMITH: Okay. And one final administrative question. With pretrial briefs is that when we would submit motions in limine as well or do you prefer those on first day of trial?

THE COURT: I don't want them the first day of trial. I want them in advance of that. I normally read and rule on motions in limine before trial and rule on them either before trial or at the outset of a trial. I want them early enough so that I don't have a gun to my head in doing that. I usually want them a week or two before the trial.

MR. SMITH: Okay. Thank you.

THE COURT: Okay.

MR. WALSH: Your Honor, one more --

THE COURT: Yes, Mr. Walsh?

MR. WALSH: I can get them to you within two weeks so that's not a problem, the 11 letters. When you say discovery is continuing I mean does that --

THE COURT: I don't -- I got the impression that Mr. Smith wants to depose Mr. Roberts.

MR. WALSH: Oh, all right.

MR. SMITH: I do not, Your Honor.

THE COURT: I'm sorry?

MR. SMITH: I do not. The person I want to depose is at this point if I'm limited to --

THE COURT: Hanson.

MR. SMITH: Hanson, correct.

MR. WALSH: Well, Hanson --

THE COURT: All right. Well, I mean you have the right to depose Hanson now, but you might to want to wait and see what of Hanson's documents I'm allowing --

MR. SMITH: I will do that.

THE COURT: -- to be disclosed.

MR. WALSH: Okay. Thank you.

THE COURT: All right. Okay. We're adjourned. Those who are here on GM tell your colleagues that --

MR. WALSH: Oh, one more thing, Your Honor. I hate

to -- the Kroll report, could we have -- can you give us an order on that?

THE COURT: You made a relevance objection on the Kroll report, Mr. Smith?

MR. SMITH: Well, I made a relevance objection. The trustee has a privilege objection.

THE COURT: Has a what?

MR. SMITH: A privilege objection, attorney/client privilege.

THE COURT: I thought Kroll is -- it's Kroll Associates, right? Aren't they --

MR. WALSH: No, it's Kroll Associates. It was retained by Reifler himself.

MR. SMITH: No, it was not.

MS. ZAVALKOFF-BABEJ: Actually, Your Honor, the trustee was asserting a work product privilege as Kroll was retained by Kramer Levin who was counsel to Pali at that time in addition to asserting --

THE COURT: I think it's unlikely that I'll find it to be privileged or even work product, but why don't you give me a copy of it so I can see it and I'll rule on it the same time as whatever I get from Mr. Walsh.

MR. WALSH: Thank you, Your Honor.

MR. SMITH: Your Honor, may I address the relevance issue?

THE COURT: I don't see a relevance issue. I see it as relevant and I assume you contend that it's relevant.

MR. SMITH: I do not contend it's relevant. Kroll wasn't even retained to do this report until July 2008, more than a year after the application for insurance was submitted. I don't see how in the world that's relevant. If --

THE COURT: Oh, forgive me, it's Mr. Walsh who wants it.

MR. SMITH: Correct.

MR. WALSH: Sure, it's relevant as I just said. I think the Court ought to read it because I think it goes back to -- and I'm not so sure -- Reifler testified that, you know, he had concerns going back. I'd like to know the breadth of the Kroll undertaking. If that was involving facts and circumstances that Reifler was concerned about between the transfer of shares from EURAM to Pali it's very relevant.

THE COURT: I remember why I thought it was relevant. I thought the Kroll report would be hearsay. It would not be admissible itself, but to the extent there were facts that Kroll discovered that might have also be known by Mr. Reifler I thought that they might lead to discoverable evidence.

MR. WALSH: Thank you.

THE COURT: But I will not make a final judgment on that until you give the report so I can see whether my instincts are sound or not.

MR. SMITH: Well, Your Honor, I will let the trustee do that because they're the holder of the privilege. I will say that it was commissioned by Kramer Levin, Pali's counsel, in the middle of litigation. So to me that seems like --

THE COURT: Yes, that's why there's a work product argument.

MR. SMITH: I thought Your Honor said there was no work product --

THE COURT: No, I said that there is a work product argument which can be blown upon a -- or which can provide a basis for discovery anyway if there is a suitable showing of need.

MR. WALSH: Thank you, Your Honor.

THE COURT: Right.

MR. WALSH: That's what I thought you said.

THE COURT: Right. All right. We're adjourned.

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C E R T I F I C A T I O N

I, COLETTE MEHESKI, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

Colette Meheski

COLETTE MEHESKI

J&J COURT TRANSCRIBERS, INC. DATE: October 18, 2012